

Reply Comments of Christopher Terry¹ and Caitlin Ring Carlson²

Before the Federal Communications Commission Washington, D.C. 20554 In the Matter of:

2018 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 18-349, Notice of Proposed Rulemaking, 33 FCC Rcd 12111 (2018); Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 202(h) (1996); Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3 (2004) (amending Sections 202(c) and 202(h) of the 1996 Act).

Public Notice, DA 21-657 (June 4, 2021). *Media Bureau Seeks to Update the Record in the 2018 Quadrennial Regulatory Review*, MB Docket No. 18-349.

¹ Christopher Terry is an assistant professor of media law and ethics in the Hubbard School of Journalism and Mass Communication at the University of Minnesota.¹ He has authored or co-authored six articles and two book chapters on issues related to FCC Media and Minority Ownership Policy and seven additional articles dealing with FCC regulations. He has been interviewed by the media more than 50 times on FCC regulatory issues, including media ownership. (Affiliation provided for identification purposes only.)

² Caitlin Ring Carlson is an associate professor of communication and media at Seattle University. She has authored or co-authored three articles regarding the lack of broadcast media ownership opportunities for women and people of color. (Affiliation provided for identification purposes only.)

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Summary

We submit this reply comment as a follow up to our initial comment in this proceeding.³ We are active scholars in the area of FCC regulation, including media ownership and minority ownership policy. In our initial comment, we proposed 4 courses of action. With this reply comment, we seek to:

- 1.) Restate our proposal that the FCC suspend any decision to change media ownership rules at this time and instead merge this interrupted 2018 Quadrennial Review with the mandated Quadrennial Review Process scheduled for 2022.
- 2.) Restate our belief that the agency should commit to conducting a dedicated evaluation of policy outcomes as part of the combined proceeding, including the development of an empirical study to assess the ability of the 2018 Incubator Program to increase ownership by women and minorities. The FCC's recently implemented rule changes from 2017 as well as the 2018 Incubator Program, which have only been operative since June of 2021, should be given an opportunity to work, and the agency should then empirically assess their outcomes as part of a larger review and assessment of media ownership policy before proceeding with additional rule changes.
- 3.) Associate ourselves with the other commentators who oppose any FCC action to modify the Radio Ownership Rules until the review we propose above is completed.
- 4.) To contribute a newly developed empirical data set on radio content production in the years between 1990-2010 to the record. We present these findings in order to further inform the discussion about the relationship between the agency's ownership and diversity goals.

Comments

The FCC's media ownership policy was freed by the U.S. Supreme Court on April 1, 2021, from the seventeen-year legal impasse created by the *Prometheus Radio Project* Cases. The FCC is now soliciting comments in the current proceeding as an element of the open, but unresolved Quadrennial Review launched in December of 2018. With another review required by Section 202(h) of the Telecommunications Act in 2022, we recommend again, as we did in our initial comment, that the FCC suspend any rule changes until the completion of the 2022 Quadrennial Review Process. As stated in our initial comment, the FCC set a precedent for incorporating ongoing quadrennial reviews into newly required ones during the crossover between the 2010 and 2014 reviews, and there is little reason to rush a decision in the few remaining months of this review cycle with another cycle pending next calendar year.

Any decision by the agency in this proceeding is likely to face at least one legal challenge which could delay the process further. Although we recognize that further delays in this process potentially harm both consumers and members of the media industry, we also believe the FCC has an

³ Christopher Terry & Caitlin Ring Carlson, Comment Letter on 2018 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, <https://ecfsapi.fcc.gov/file/1082655255165/Terry%20and%20Carlson%20Comment%20FCC%2018-349%20.pdf>.

opportunity to correct past wrongs if it takes the time to conduct a proper review before taking new action. We believe, and have argued in published scholarship, that the FCC acted hastily when implementing the media ownership rule changes contained in the 1996 Telecommunications Act. In doing so, the agency failed to accurately assess the outcomes of the (then) new policies. The failure to adopt a rolling, incremental approach led to a rapid wave of ownership consolidation across the commercial media industry, especially for radio.⁴

As such the Commission has struggled to find evidence to support its decisions regarding the media ownership rules it tried to implement between 2003 and 2017. By relying heavily on regulatory philosophy that promotes economic competition, and a policy implementation that favors quantitative assessments of diversity through proxy measurement methodology, the FCC helped to sustain a legal stalemate that lasted 17 years. The FCC's inability to produce empirical support for the relationship between policy outcomes and policy implementation was central to the questions raised by the Third Circuit throughout the *Prometheus Radio Project* decisions.

Since our initial comment, the FCC has released an additional set of minority ownership data.⁵ The latest data, from 2019, reports a continuing policy failure to resolve longstanding underrepresentation in broadcast ownership by racial minorities, ethnic minorities and women.⁶ Whether intentional, as suggested recently by a coalition led by Free Press,⁷ or as an unintended result of poor policy implementation, the agency's stated objectives on diversity are not being met.

Empirical Data

The primary intent of this reply comment is to submit the study data presented below for the FCC's consideration and utilization. We believe that the findings can further inform the continuing debate on the conceptual relationship between ownership and diversity. As the FCC begins the process of restarting media ownership policy, we believe an examination of past policy implementation outcomes can help to illuminate a better path forward.

Between 1996 and 2005, the FCC justified a substantial number of broadcast mergers using theoretical benefits, such as the economy of scale, rather than relying on a public trustee model, without any thought for how this would create such economies. As a result, media companies, especially in radio, merged at a breakneck rate, then quickly reduced air and news staff, and implemented content sharing practices to reduce production costs, all of which, logically resulted in a reduction of the diversity in media.

⁴ See generally Christopher Terry, *Localism as a Solution to Market Failure: Helping the FCC Comply with the Telecommunications Act*, 71 FED. COMM'NS L. J. 327 (2019).

⁵ ⁵, FCC: MEDIA BUREAU AND OFF. OF ECONS. & ANALYTICS, FIFTH REPORT ON OWNERSHIP OF BROADCAST STATIONS 1–4 (2021), <https://docs.fcc.gov/public/attachments/DA-21-1101A1.docx>.

⁶ “Women held a majority ownership interest in 8% of commercial broadcast stations, while men held a majority ownership interest in 65% of commercial broadcast stations. White persons held a majority ownership interest in 76% of commercial broadcast stations, while persons belonging to racial minority groups held a majority ownership interest in 4% of commercial broadcast stations. Finally, Hispanic/Latino persons held a majority ownership interest in 6% of commercial broadcast stations while not Hispanic/Latino persons held a majority ownership interest in 73% of commercial broadcast stations.” *Id.* at 4.

⁷ FREE PRESS, REQUEST FOR NOTICE OF INQUIRY INTO HISTORY OF SYSTEMIC RACISM IN FCC POLICY AND LICENSING 1–4 (2021), https://www.freepress.net/sites/default/files/2021-09/FCC_2070_Letter_Final_September_2021.pdf.

In an effort to assess these changes, we developed a study design using accessible archival records of the Broadcasting Yearbook.⁸ A small coding team was assembled, trained and sent to work examining and collecting data from the archive from the years between 1990-2010.⁹ This twenty year period predates the Telecommunications Act and continues until the FCC's quadrennial process stalled out during the 2010 review. It includes the primary years of radio ownership consolidation between 1996-2005.

Although a somewhat questionable methodological approach to assessing the availability of viewpoint diversity, the FCC has relied on empirical scholarship using "format" counts as a methodology as part of the rulemaking and Quadrennial Review processes for media ownership in both 2006 and 2010.¹⁰ As scholars, we have used format counts in published scholarship on minority ownership and content production¹¹ and as an assessment of the FCC's 2018 Incubator Proposal shortly after it was initially introduced.¹²

Using Radio "format" as an assessment mechanism is a practical solution to two problems. First, almost all radio stations identify themselves with one primary format, providing opportunities for quantitative assessments of diversity that the media industry itself sets the parameters for. Second, by allowing the radio station's self-identification with a format as a proxy for actual content analysis, it removes the agency or its supported researchers from an obligation to make subjective, and potentially problematic in terms of the First Amendment, judgements about content.

The data in this analysis was collected on the available radio formats for each year. A second analysis was conducted, collecting the available data on the number of stations carrying and the total quantity of available specialty programming for three groups: African American (Black), Hispanic (Spanish) and women.

Collectively, the data suggests that many of the proposed benefits of economy of scale, especially the assumptions for increased programming diversity, were not achieved in the wake of the major mergers in the radio industry. In fact, the largest increase in format diversity actually predated the implementation of the majority the rule changes contained in the Telecommunications Act. During the same time period, the number of stations offering specialty programming declined for each of the minority groups (Black, Hispanics and women). Spanish programming time increased modestly during the study period, but the quantity of Black and women's specialty programming both decreased during the sample time frame.

⁸ *Broadcasting Yearbook 1935-2010*, WORLD RADIO HISTORY, <https://worldradiohistory.com/Broadcasting-Yearbook.htm> (last visited Sept. 30, 2021).

⁹ Since the data was collected for this dataset, the online archive has added additional years for 2013, 2014, 2015 and 2017. This data was not available at the time this analysis was conducted. *See id.*

¹⁰ ¹⁰ *See generally* TASNEEM CHIPTY, FCC MEDIA OWNERSHIP STUDY #5: STATION OWNERSHIP AND PROGRAMMING IN RADIO AVAILABLE (2007), <https://docs.fcc.gov/public/attachments/DA-07-3470A6.pdf>; JOEL WALDFOGEL, RADIO STATION OWNERSHIP STRUCTURE AND THE PROVISION OF PROGRAMMING TO MINORITY AUDIENCES: EVIDENCE FROM 2005-2009 (2011), <https://docs.fcc.gov/public/attachments/DOC-307482A1.pdf>.

¹¹ Christopher Terry, *Minority Ownership: An Undeniable Failure of FCC Media Ownership Policy*, 5 WIDENER J. L. ECON. & RACE 18 (2013).

¹² Christopher Terry & Caitlin Ring Carlson, *Hatching Some Empirical Evidence: Minority Ownership Policy and the FCC's Incubator Program*, 24 COMM. L. & POL'Y 403 (2019).

Distinct Radio Formats 1990-2020

Table 1

Year	Formats
1990	44
1991	41
1992	40
1993	48
1994	49
1995	50
1996	65
1997	68
1998	65
1999	64
2000	64
2001	68
2002/3	70
2003/4	67
2005	67
2006	65
2007	67
2008	66
2009	63
2010	65

The data presented represents the findings of a content analysis conducted using the archive of the Broadcasting Yearbook ([available here](#)).

Coders examined and collected the data for reported radio formats for each available year 1990-2010.

Findings:

Between 1990-2010, the number of distinct radio formats increased by roughly a third from 44 to 65.

In the sample time frame, the largest growth in overall commercial radio format diversity occurred between 1995 and 1996, predating most of the larger radio mergers following the implementation of the new ownership limits contained in the 1996 Telecommunications Act.

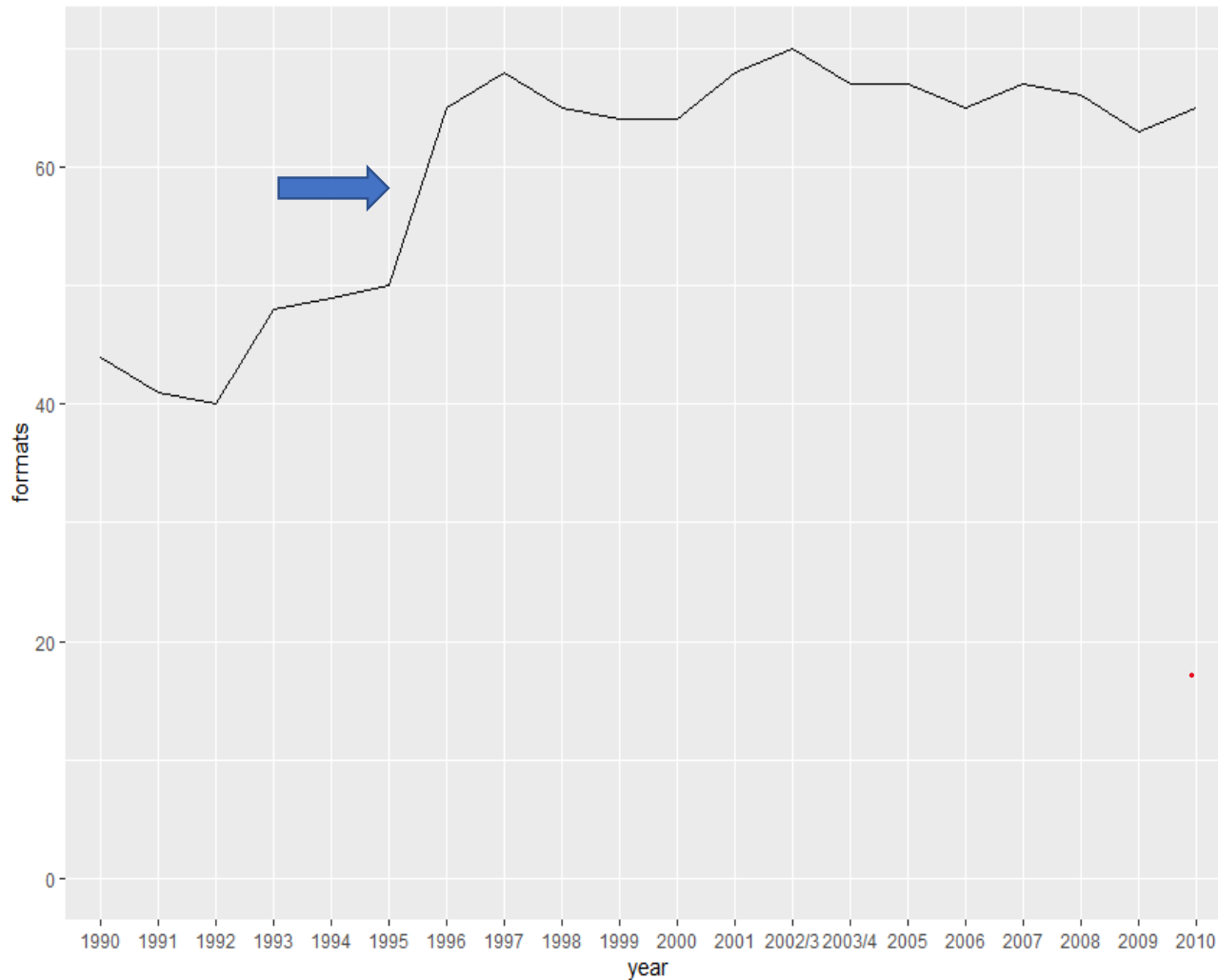
Format diversity stagnated substantially after the major radio mergers, including AM/FM and Clear Channel, were completed in 2000.¹ Notably, this finding contradicts the longstanding conceptual premise underlying FCC media ownership policy that increasing consolidation of ownership would increase internal competition which in turn would provide incentives to diversify programming.

In the years following the agency's proposed Diversity Index in 2003, overall format diversity was eventually reduced to the level seen in 1996.

- 1.) In re: Applications of Shareholders of AMFM, Inc. (Transferor) and Clear Channel Communications, Inc. (Transferee) For Consent to the Transfer of Control of AMFM Texas Licenses Limited Partnership, AMFM Radio Licenses, LLC, Capstar Texas Limited Partnership, WAXQ License Corp., WLTW License Corp., Cleveland Radio Licenses, LLC, and KLOL License Limited Partnership. Licensees of WTKE(FM), Andalusia, AL, et. Al (FCC 00-296) Available at: <https://docs.fcc.gov/public/attachments/FCC-00-296A1.pdf>

Distinct Radio Formats 1990-2010

Figure 1



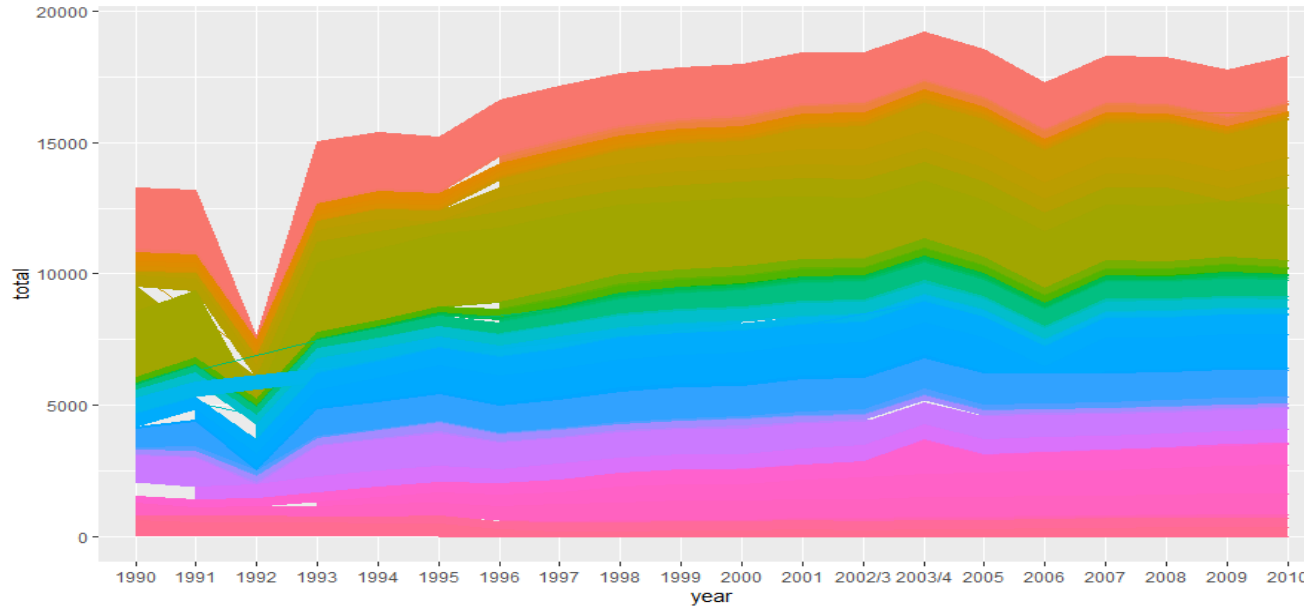
This graph represents the summary data from Table 1 above.

Notably, the largest growth in overall Format Diversity occurs prior to the major media mergers which occurred in radio station ownership in years 1999 and 2000.

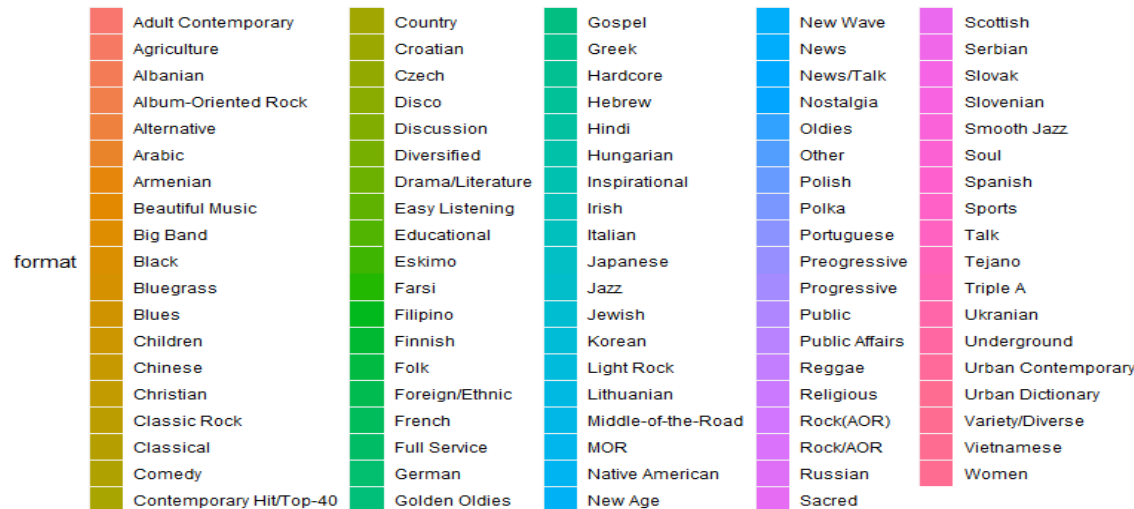
After changes to the national ownership limits on radio stations were implemented, format diversity stagnated at close to the level seen in 1996.

Total Radio Formats 1990-2010

Figure 2



This visualization reports the frequency of different formats identified during each year of the study period.



Top 10 Radio Formats 1990-2010

Figure 3

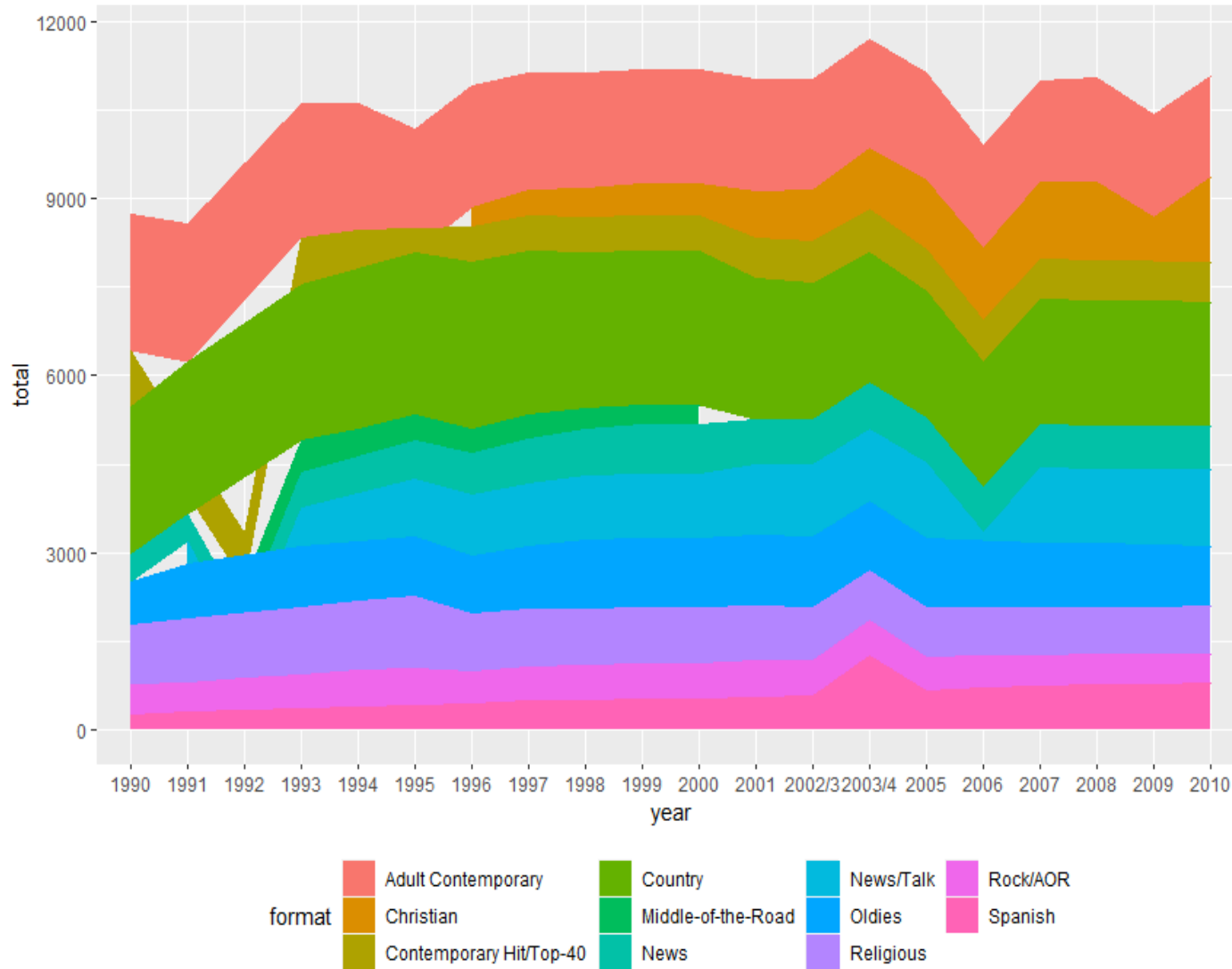


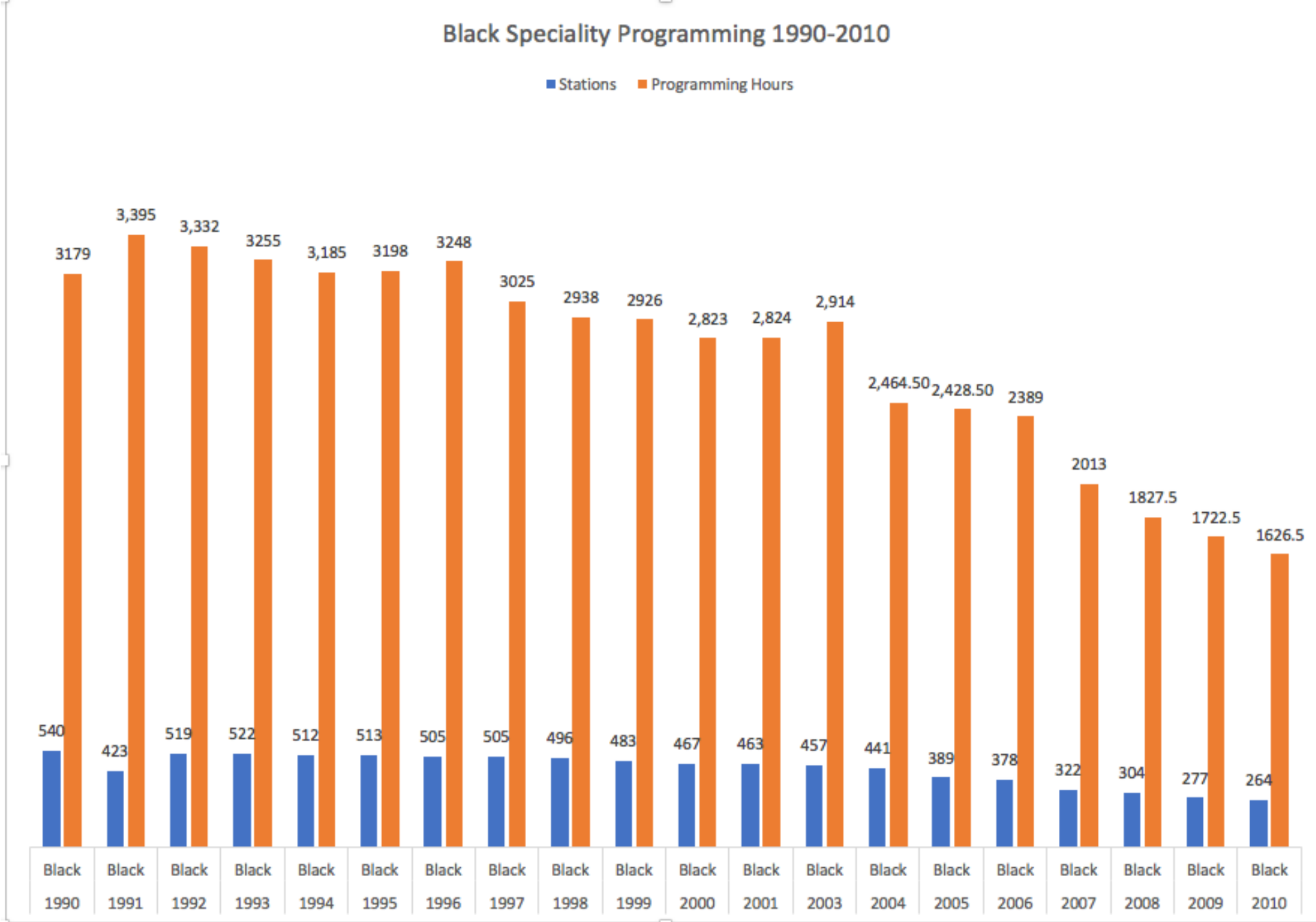
Figure 3 presents the frequency of the top ten most common radio formats across the study period.

Most notably, News and News/Talk stations, the two informational formats among the top ten formats, and thus the most likely to contribute some form of viewpoint diversity or to motivate political participation show limited growth, in terms of the number of stations during the 20 years of the study period.

Music formatting did increase overall, but informational content production appears stagnant.

This correlation is likely due to the move away from local programming to national syndicated content for talk radio.

Figure 4



Black

Table 2

Year	Stations	Programming Hours
1990	540	3179
1991	423	3,395
1992	519	3,332
1993	522	3255
1994	512	3,185
1995	513	3198
1996	505	3248
1997	505	3025
1998	496	2938
1999	483	2926
2000	467	2,823
2001	463	2,824
2002/3	457	2,914
2003/4	441	2,464.50
2005	389	2,428.50
2006	378	2389
2007	322	2013
2008	304	1827.5
2009	277	1722.5
2010	264	1626.5

In a second analysis, the coders also examined and collected data from the Broadcast and Cable Yearbooks on the availability of specialized programming during the study period.

In addition to the stagnation in format diversity during the study period, the years 1990-2010 saw significant reductions in the number of stations reporting that they were carrying specialized programming targeting African Americans and Women.

This drop off, in content diversity included reductions in the number of stations who reported carrying this programming, as well as the overall amounts of the specialized, targeted programming being carried.

For “Black” specialized programming, the data (presented in Figure 4 and summarized in table 2) indicates a steady decline in both the number of stations as well as the overall amounts of content that were available between 1990-2010.

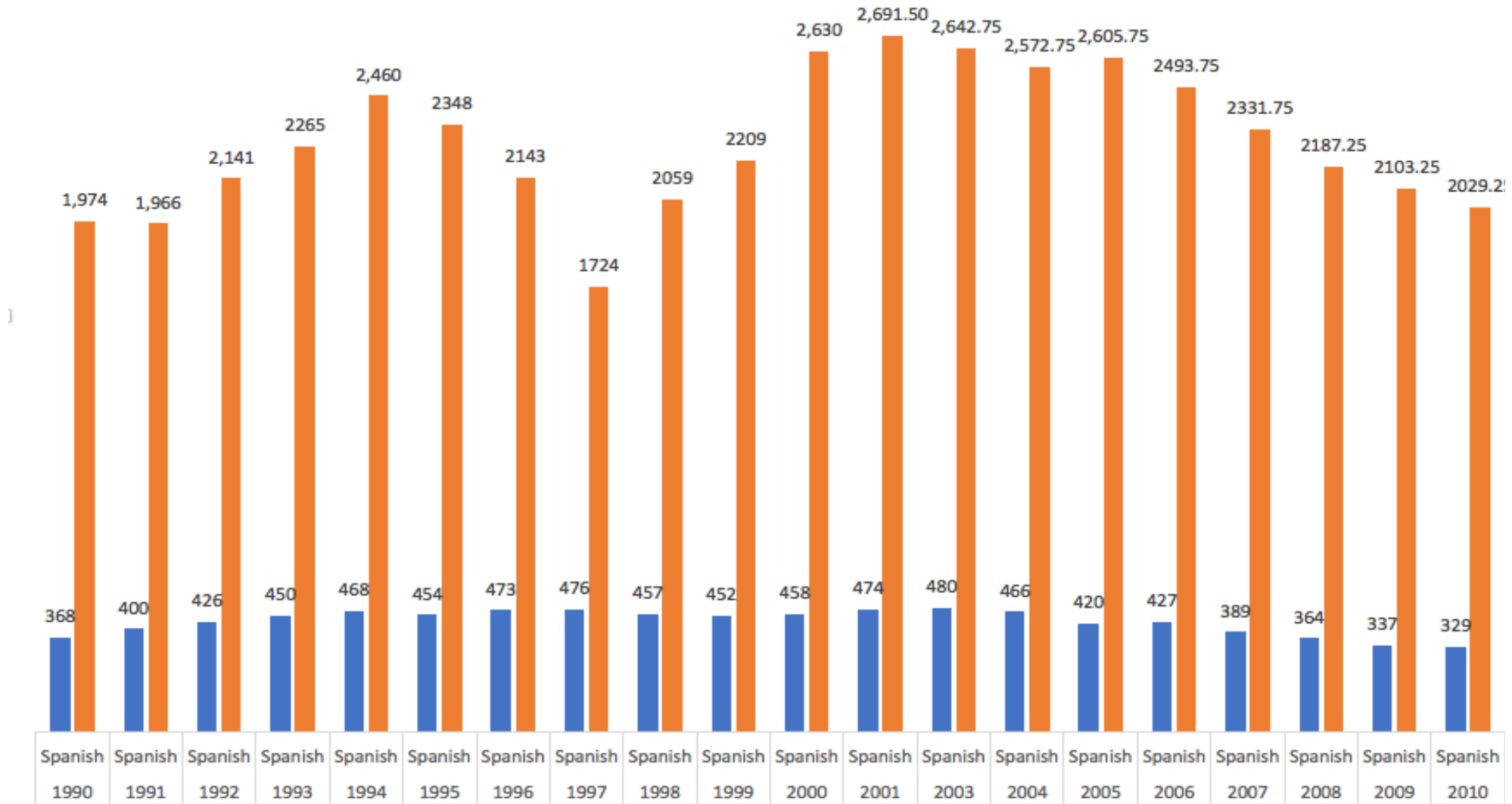
Black ownership of broadcast radio stations also demonstrated limited growth during the study period, growing from 175 stations in 1990¹ to 232 in 2019.²

- 1.) National Telecommunications and Information Administration, “CHANGES, CHALLENGES, AND CHARTING NEW COURSES: Minority Commercial Broadcast Ownership in the United States.” United States Department of Commerce. (2000) at page 38. Available at <https://www.ntia.doc.gov/files/ntia/publications/mtdpreportv2.pdf>
- 2.) FCC Ownership data from 2004-2007 is available here: <https://www.fcc.gov/media/female-minority-broadcast-ownership-data> and ownership data from 2009-2019 is available at <https://www.fcc.gov/biennial-forms-323-and-323-e-broadcast-ownership-data-and-reports>

Figure 5

Spanish Speciality Programming 1990-2010

■ Stations ■ Programming Hours



Spanish

Table 3

Year	Stations	Programming Hours
1990	368	1,974
1991	400	1,966
1992	426	2,141
1993	450	2265
1994	468	2,460
1995	454	2348
1996	473	2143
1997	476	1724
1998	457	2059
1999	452	2209
2000	458	2,630
2001	474	2,691.50
2002/3	480	2,642.75
2003/4	466	2,572.75
2005	420	2,605.75
2006	427	2493.75
2007	389	2331.75
2008	364	2187.25
2009	337	2103.25
2010	329	2029.25

During the study period, Latino and Hispanic ownership of stations increased from 88 to 516 radio stations per the NTIA¹ and FCC 323² ownership data that is publicly available.

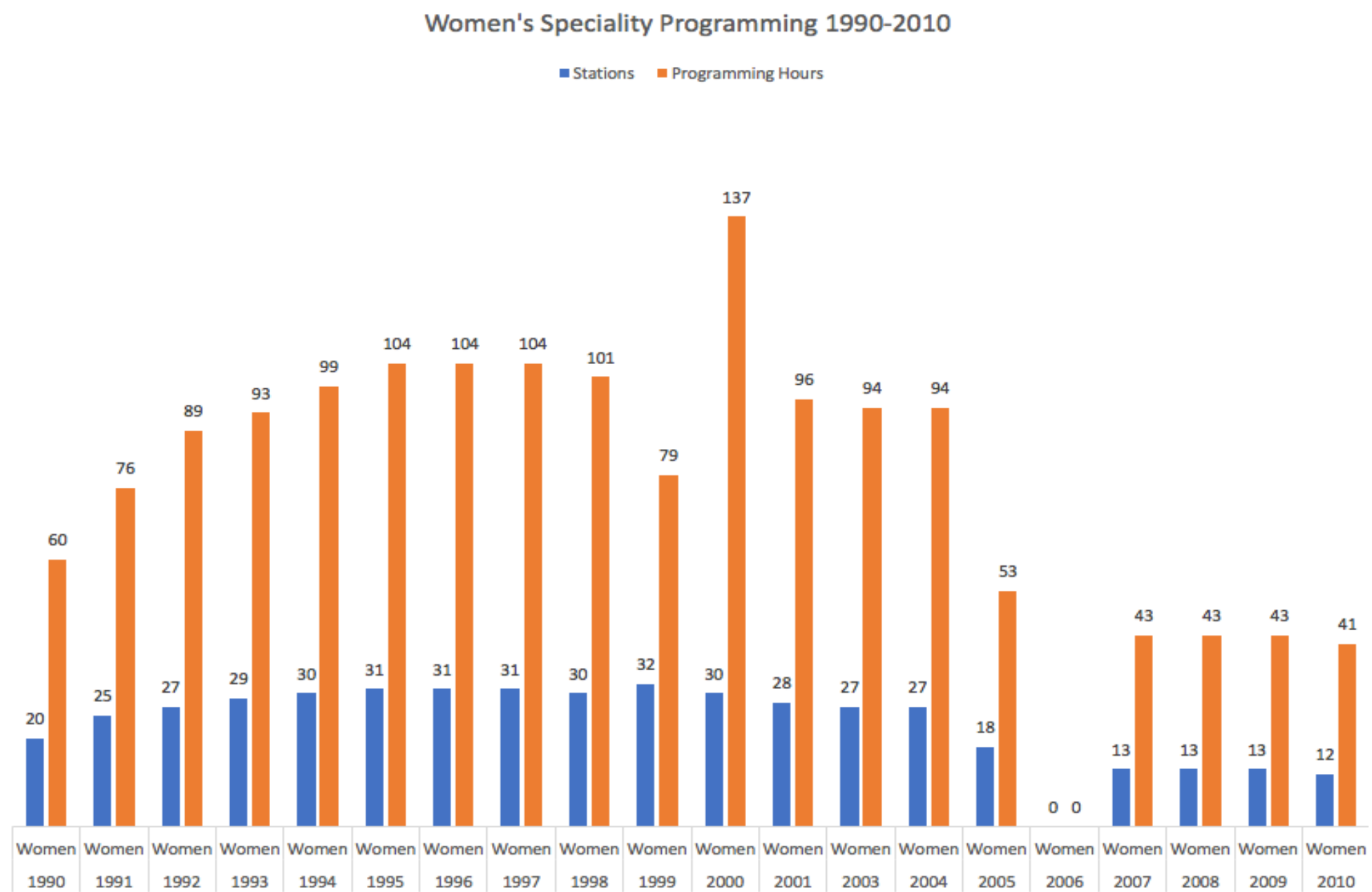
Figure 5 and Table 3 present data on stations carrying specialized programming content with a “Spanish” focus. Spanish orientated programming saw a modest increase in overall programming content, but a drop in total content from the high point which occurred in 2001.

After 2002/3, the number of stations carrying specialty Spanish programming began to decline steadily a change that occurred during a period of rapid growth in the ownership of radio stations by the ethnic group labeled “Hispanic” in the FCC 323 data.

Note that this data includes only self-reported specialty programming with an intended target identified as “Spanish.”

- 1.) National Telecommunications and Information Administration, “CHANGES, CHALLENGES, AND CHARTING NEW COURSES: Minority Commercial Broadcast Ownership in the United States.” United States Department of Commerce. (2000) at page 38. Available at <https://www.ntia.doc.gov/files/ntia/publications/mtdpreportv2.pdf>
- 2.) FCC Ownership data from 2004-2007 is available here: <https://www.fcc.gov/media/female-minority-broadcast-ownership-data> and ownership data from 2009-2019 is available at <https://www.fcc.gov/biennial-forms-323-and-323-e-broadcast-ownership-data-and-reports>

Figure 6



Women

Table 4

Year	Stations	Programming Hours
1990	20	60
1991	25	76
1992	27	89
1993	29	93
1994	30	99
1995	31	104
1996	31	104
1997	31	104
1998	30	101
1999	32	79
2000	30	137
2001	28	96
2002/3	27	94
2003/4	27	94
2005	18	53
2006	0	0
2007	13	43
2008	13	43
2009	13	43
2010	12	41

Women have long been underrepresented in terms of media ownership, and a policy resolution to this situation has been complicated by the Court decisions in *Adarand*¹ and *Lamprecht*.²

Importantly, usable data on ownership of stations by women between 1990-2004 is in short supply. The FCC has publicly available data, taken from Form 323 on a biennial basis starting in 2004.³

Data from the study period, reported in Figure 6 and summarized in Table 4, also suggests that stations that carried, as well as the quantity of specialty programming that targeted Women has been in short supply for some time. This shortcoming is especially problematic as the availability of specialty programming targeting women would be a significant indicator of diversity generally, but also of viewpoint diversity specifically.

Although reductions occurred between 1990-2010 for both the number of stations and also the amount of programming that was produced, the reductions were functionally from very little to almost none.

Note that this data does not incorporate music formats with targeted demographics that include women, this data includes self-reported specialty programming with an intended audience of women.

- 1.) *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).
- 2.) *Lamprecht v. F.C.C.*, 958 F.2d 382 (D.C. Cir. 1992).
- 3.) FCC Ownership data from 2004-2007 is available here: <https://www.fcc.gov/media/female-minority-broadcast-ownership-data> and ownership data from 2009-2019 is available at <https://www.fcc.gov/biennial-forms-323-and-323-e-broadcast-ownership-data-and-reports>